VIRGINIA
LAW REVIEW

Vol. IX. DECEMBER, 1922 No. 2

FEDERAL POLICE REGULATION BY TAXATION.

THE recent decision of the Supreme Court that the Child Labor Tax Law of 1919 is unconstitutional [1] will probably stand out as one of the landmarks in our constitutional history. It brings to a halt the attempt to use the federal taxing power as a substitute for a general police power, an attempt which, if successful, would have revolutionized our constitutional system by practically wiping out the sovereignty of the States. This decision should go far toward clearing the air, so to speak, of the fogs that were fast obscuring some of the most fundamental principles of constitutional law. It may be in order at this time to take a survey of the course of constitutional history culminating in this decision.

The taxing power is conferred by the Constitution upon Congress in the broadest terms. It is subject only to the few limitations imposed by the Constitution itself. The purposes for which taxes may be laid are comprehensively stated to be "to pay the debts and provide for the common defense and general welfare of the United States". Duties, imposts and excises must be laid uniformly, and direct taxes must be apportioned among the States according to population; no preference shall be given by any regulation of revenue to the ports of one State over those of another. No tax may be laid on exports or on the governmental agencies of the States, but, with these two exceptions, everything that is in its nature taxable may be taxed by Congress. Congress may select the subjects of taxation at will, taxing some things and refraining from taxing others as

[1] Bailey *v.* Drexel Furniture Co., 42 Sup. Ct. 449.

it sees fit. No limitation is placed upon the rate of taxation. It is no objection to the constitutionality of a tax that it is fixed so high as to suppress the thing taxed. Since it was so declared by Chief Justice Marshall in the famous case of *McCulloch* v. *Maryland,*[2] it has been a truism of constitutional law that "the power to tax involves the power to destroy".

The normal and ostensible object of a tax law is, of course, to raise money, but it has been settled by a long series of decisions of the Supreme Court that where Congress exercises its taxing power within the limits laid down by the Constitution, its motives in imposing the tax cannot be inquired into. A tax law may not be declared void because its effect may be to accomplish some other purpose than the raising of revenue. It is sufficient to sustain the legislation that it is within the taxing power of Congress. A tax may be for the "general welfare" though the raising of revenue may be only a subordinate purpose of the tax, and even though no revenue whatever be produced by it. A conspicuous instance of such a tax is a "protective" tariff with the rate fixed so high as to reduce or stop the importation of the thing taxed. Protective taxation of imports has been the practice of Congress from the beginning, and, though the Supreme Court has never passed on the question, the constitutionality of such taxation is now conceded.

The first attempt since the adoption of the Constitution to use the taxing power to suppress the thing taxed was by the States. Upon the opening of the Second Bank of the United States in 1817, a determined attack upon it was begun in several of the States. The Maryland legislature passed an act imposing an annual tax of $15,000 upon the Baltimore branch of the bank, besides other taxes. The two branch banks in Ohio were taxed $50,000 a year, and those in Kentucky were taxed $60,000.[3] The States were defeated in their attempt to destroy the bank by the decision of the Supreme Court in *McCulloch* v. *Maryland* that the bank, as an agency of the federal government, was not subject to taxation by a State. The constitutional objection to the tax was, of course, not that the taxing power was being used

[2] 4 Wheat. (U. S.) 316.

[3] 4 BEVERIDGE, LIFE OF MARSHALL, 206-208.

for the purpose of destroying the thing taxed, but that, because it could be so used, the agencies of the federal government were, by implication, exempted by the Constitution from State taxation. This decision is the leading authority for the well-settled proposition that the taxing power may legitimately be used in such a manner as to destroy the subject of taxation, provided it is within the jurisdiction of the taxing power.

The first case involving the constitutionality of a federal tax imposed for the specific purpose of destroying the thing taxed, was the famous case of *Veazie Bank* v. *Fenno*,[4] decided at the December, 1869, term of the Supreme Court. The tax in question was a tax of ten per cent. imposed by the act of Congress of July 13, 1866, on the circulating notes of State banks, the object of the tax being to drive such notes out of existence so as to leave a clear field for the notes issued under the authority of the federal government. Prior to this act, Congress had passed several statutes, beginning with the act of February 25, 1863, authorizing national banking associations and taxing the circulating notes of both national and State banks. These statutes were a part of the legislation for financing the war operations of the government during the Civil War.

The constitutionality of this tax was challenged on two grounds: first, that it was a direct tax, and void because not apportioned as required by the Constitution; and, second, that it impaired a franchise granted by the State, and that Congress had no power to do this. The court sustained the tax as against both objections. After thus disposing of the main points in the case, the court by Chief Justice Chase, continued:

> "It is insisted, however, that the tax in the case before us is excessive, and so excessive as to indicate a purpose on the part of Congress to destroy the franchise of the bank, and is, therefore, beyond the constitutional power of Congress. The first answer to this is that the judicial cannot prescribe to the legislative department of the government limitations upon the exercise of its acknowledged powers. The power to tax may be exercised oppressively upon persons, but the responsibility of the legislature is not to the courts, but to the people by whom its members are elected. So if a par-

[4] 8 Wall. (U. S.) 533.

ticular tax bears heavily upon a corporation, or a class of corporations, it cannot, for that reason only, be pronounced contrary to the Constitution.

"But there is another answer which vindicates equally the wisdom and the power of Congress. It cannot be doubted that under the Constitution the power to provide a circulation of coin is given to Congress. And it is settled by the uniform practice of the government and by repeated decisions, that Congress may constitutionally authorize the emission of bills of credit. * * * These powers, until recently, were only partially and occasionally exercised. Lately, however, they have been called into full activity, and Congress has undertaken to supply a currency for the entire country. * * * Having thus, in the exercise of its undisputed constitutional powers, undertaken to provide a currency for the whole country, it cannot be questioned that Congress may, constitutionally, secure the benefit of it to the people by appropriate legislation. To this end, Congress has denied the quality of legal tender to foreign coins, and has provided by law against the imposition of counterfeit and base coin on the community. To the same end, Congress may restrain, by suitable enactments, the circulation as money of any notes not issued under its own authority. Without this power, indeed, its attempts to secure a sound and uniform currency for the country must be futile."

The distinguishing feature of this case is that Congress was simply using its taxing power in aid of its power to establish a national currency. Instead of taxing these notes out of existence, Congress could have accomplished the same result by prohibiting their circulation as money. There was thus no attempt by Congress to do indirectly what it could not have done directly. Taxation was an easy and effective means of securing the desired end, and the end itself was legitimate. Although the clause giving Congress the power to make all laws which shall be necessary and proper for carrying into execution the powers granted to it, was not invoked in support of this act of Congress, the statute was clearly appropriate legislation under that clause.[5]

[5] The close connection between the taxing power and the other powers of Congress is further illustrated by the Head Money Cases, 112 U. S. 580, 5 Sup. Ct. 247, decided in 1885. In that case the act of August 3, 1882, imposing a "duty" of fifty cents for every passenger, not a citizen of the

It will be seen that this case affords no authority whatever for the use of the federal taxing power to effect a usurpation by Congress of the reserved powers of the States. That the taxing power may be so used is expressly denied by the court. With reference to the scope of this power, the Chief Justice said:

> "There are, indeed, certain virtual limitations, arising from the principles of the Constitution itself. It would undoubtedly be an abuse of the power if so exercised as to impair the separate existence and independent self-government of the States, or if exercised for ends inconsistent with the limited grants of power in the Constitution."

There could scarcely be a more emphatic repudiation of such use of the taxing power as was attempted in the Child Labor Law of 1919.

In the case of *McCray* v. *United States,*[6] decided at the October term, 1903, a different phase of the question was presented. By an act of May 9, 1902, amending an earlier act of 1886, Congress imposed a tax of ten cents a pound on oleomargarine, "provided, when oleomargarine is free from artificial coloration that causes it to look like butter", the tax was to be one-fourth of one cent per pound. The effect of such a tax, of course, would be to keep out of the market oleomargarine so artificially colored as to pass for butter, and thus prevent imposition on the public. An act of Congress directly prohibiting the manufacture and sale of such fraudulent imitation butter would plainly have been unconstitutional, and Congress in this case was trying to do indirectly by the exercise of the taxing power what it could not have done directly. Nevertheless the act was sustained by the Supreme Court, Chief Justice Fuller and Justices Brown and Peckham dissenting.

United States, brought into the United States by steam or sailing vessel from a foreign port, was held to be a valid exercise of the power to regulate commerce with foreign nations. Although of opinion that this imposition might have been sustained as an exercise of the taxing power, the court held that it was more properly an exercise of the commerce power. The court said: "If this is an expedient regulation of commerce by Congress, and the end to be attained is one falling within that power, the act is not void because, within a loose and more extended sense than was used in the Constitution, it is called a tax."

[6] 195 U. S. 27, 24 Sup. Ct. 769.

In this case Congress was clearly using the taxing power as a substitute for the police power, which has not been granted to it, yet it is hard to see on what ground the act could have been held unconstitutional. Honest oleomargarine and fraudulent imitation butter are both equally subject to taxation, and, being different kinds of commodities, they may be taxed at different rates. And the Constitution places no limit upon the rate of taxation. The fact that the purpose of the act was to destroy a dishonest trade and not to raise a revenue, cannot affect the case. Having found that the tax was lawfully imposed, the court held that the motive or purpose of Congress in passing the statute could not be inquired into.

In so holding the court, by Mr. Justice White, said:

> "The decisions of this court from the beginning lend no support whatever to the assumption that the judiciary may restrain the exercise of lawful power on the assumption that a wrongful purpose or motive has caused the power to be exerted. * * * Undoubtedly in determining whether a particular act is within a granted power, its scope and effect may be considered. Applying this rule to the acts assailed, it is self-evident that on their face they levy an excise tax. That being their necessary scope and operation, it follows that the acts are within the grant of power. The argument to the contrary rests on the proposition that, although the tax be within the power, as enforcing it will destroy or restrict the manufacture of artificially colored oleomargarine, therefore the power to levy the tax did not obtain. This, however, is but to say that the question of power depends, not upon the authority conferred by the Constitution, but upon what may be the consequence arising from the exercise of the lawful authority."

The federal taxing power has since been employed for similar police purposes.[7] Thus, by an act of August 9, 1912,[8] Con-

[7] A tax becomes a means of suppression, of course, only when the rate becomes prohibitive, but it should be noted that there is no absolute rate that will have this effect in all cases. A tax of ten per cent. was sufficient in the Veazie Bank case, and, no doubt, a tax of two per cent. would prevent the marketing of State bonds, yet a tax of one hundred per cent. is easily borne in some cases. These facts show how futile would be the attempt to have a tax law held unconstitutional because the rate is too high, even if the Constitution had not left the rate entirely to the discretion of Congress.

[8] 37 Stat. L. 81 (tax of two cents per hundred matches).

gress put an end to the manufacture of white phosphorous matches, which is dangerous to workmen, by imposing a prohibitive tax on matches of this kind. In the same way the manufacture of opium for smoking purposes was stopped by an act of January 17, 1914.[9]

Tax laws of this type are police regulations only in that their effect is to suppress or restrict the thing taxed; they are not, properly speaking, regulations of the thing itself. They are not different in form and general character from tax laws which yield revenue, and it involves no straining of the Constitution to hold them valid. Of a different sort are tax laws which combine with the imposition of the tax detailed regulations of the subject of taxation. Several years before the decision in the McCray case the Supreme Court had recognized the principle that a tax law is not necessarily unconstitutional because its effect may be regulative as well as to raise a revenue. By an act of August 2, 1886, entitled "An act defining butter, also imposing a tax upon and regulating the manufacture, sale, importation, and exportation of oleomargarine", Congress regulated in detail the packing, marking, stamping, and branding of oleomargarine, and imposed a penalty for violation of the act.[10] In sustaining a conviction under this act, the court said:[11]

> "The act before us is on its face an act for levying taxes, and, although it may operate in so doing to prevent deception in the sale of oleomargarine as and for butter, its primary object must be assumed to be the raising of revenue. * * * The oleomargarine legislation does not differ in character from [that relating to the taxation of tobacco and distilled spirits], and the object is the same in both, namely, to secure revenue by internal taxation, and to prevent fraud in the collection of such revenue. Protection to purchasers in respect to getting the real, and not a spurious article, cannot be held to be the primary object in either instance; and the identification of dealer, substance, quantity, etc., by marking and branding, must be regarded as a means to effectuate the objects of the act in respect of revenue."

This principle was carried to the extreme limit in the Harri-

[9] 38 Stat. L. 277 (tax of $300 per pound).
[10] 24 Stat. L. 209.
[11] *In re* Kolleck, 165 U. S. 526, 17 Sup. Ct. 444.

son Narcotic Drug Act of December 17, 1914.[12] By this act, under the guise of an excise law, Congress undertook to regulate the sale of narcotic drugs throughout the United States. Having once admitted the principle that there might be incidental regulation in a tax law, it was not hard to increase the amount of regulation, and, in the Harrison Act, regulation is obviously the primary and taxation only the incidental object of the law. This law is only one of a number of important laws that have been passed by Congress in the past twenty years in response to the popular demand for federal regulation of matters of general interest. The act imposes a special tax on the manufacture, importation, sale, or gift of narcotic drugs, and aims, by the imposition of penalties, to confine the sale of such drugs to registered dealers and to physicians and to persons coming to dealers with legitimate prescriptions of physicians. The law provides in detail for registration, the keeping of records, and the giving of prescriptions. The tax is nominal, being one dollar a year for every person dealing in any way in narcotic drugs.[13]

One Doremus, a physician duly registered under the law, and who had paid the required tax, was indicted under section 2 of the act, in the United States District Court for the Western District of Texas, for selling 500 tablets of heroin to an individual without the written order prescribed by the statute, the sale being also contrary to other provisions of law. Upon demurrer to the indictment, the District Court held this penal section unconstitutional on the ground that it was not a revenue measure, and was an invasion of the police power reserved to the States.[14] The Supreme Court reversed this decision and held the law constitutional, Chief Justice White and Justice McKenna, Van Devanter and McReynolds dissenting.[15] It was, of course, clear that Congress could tax the traffic in narcotic drugs, and the court held that the provisions for subjecting the sale and distribution of the drugs to official supervision and inspection "tend to di-

[12] 38 Stat. L. 785.

[13] The tax has since been much increased. Act of February 24, 1919. 40 Stat. L. 1130.

[14] United States *v.* Doremus, 246 Fed. 958.

[15] United States *v.* Doremus, 249 U. S. 86, 39 Sup. Ct. 214. A doubt as to the constitutionality of this act was expressed in United States *v.* Jun Fuey Moy, 241 U. S. 394, 36 Sup. Ct. 658.

minish the opportunity of unauthorized persons to obtain the drugs and sell them clandestinely without paying the tax", and thus have some reasonable relation to the exercise of the taxing power. Thus the regulation of the drug business and the practice of medicine has been largely brought within federal jurisdiction.

In this case the dissenting justices seem to have the Constitution on their side. The distinction between the oleomargarine act and the Harrison Act seems perfectly clear. The oleomargarine act was plainly what it purported to be; its real object was to impose a tax, the regulations being intended merely to make possible its collection. In the case of the Harrison Act one cannot escape the conviction that the object of the law was to regulate the drug traffic and that the provision for the one dollar tax was put in merely to give a color of constitutionality to the statute. There is a difference between appropriate regulations in support of a tax and a tax merely in support of regulations.

While this development of a federal police power through the taxing power was in progress, the commerce power was being used in the same way. Through its control over interstate commerce Congress suppressed lotteries and the traffic in impure and misbranded food and drugs, and to a great extent the liquor traffic. By the Mann Act it undertook the punishment of personal immorality. These various laws were sustained, without exception, by the Supreme Court, and between the taxing power and the commerce power and its control over the postal service, Congress seemed to be in a fair way toward securing for itself a general police power.

The first check came in the case of the Child Labor Law of 1916.[16] This act provided a detailed regulation of child labor throughout the country by the device of prohibiting the interstate transportation of the products of establishments not conforming to these regulations. It having been settled in the *Lottery Case* and later cases [17] that Congress could constitutionally

[16] 39 Stat. L. 675.

[17] Champion *v.* Ames (Lottery Cases), 188 U. S. 321, 23 Sup. Ct. 431; Hipolte Egg Co. *v.* United States, 220 U. S. 45, 31 Sup. Ct. 364; Hoke *v.* United States, 227 U. S. 308, 33 Sup. Ct. 281; United States *v.* Hill, 248 U. S. 420, 39 Sup. Ct. 143.

exclude from interstate commerce articles of objectionable character aptly designated "outlaws of commerce", Congress attempted in the Child Labor Law to exclude unobjectionable commodities merely because not produced in accordance with the regulations prescribed by Congress. This act ignored the clear, well-settled, and important distinctions between *production*, which is a matter for State control, and *marketing* through the channels of interstate commerce, which is subject to regulation by Congress.[18] The admission of the principle involved in this statute would have taken from the States and given to Congress the control of productive industry of all kinds throughout the United States. This revolutionary statute was held unconstitutional on the ground that it was not a proper exercise of the power to regulate interstate commerce, and also because it was an invasion of the police power reserved to the States in the Tenth Amendment to the Constitution.[19] In its opinion, the court, by Mr. Justice Day, said:

> "The far-reaching result of upholding the act cannot be more plainly indicated than by pointing out that if Congress can thus regulate matters entrusted to local authority by prohibition of the movement of commodities in interstate commerce, all freedom of commerce will be at an end, and the power of the States over local matters may be eliminated, and thus our system of government be practically destroyed."

This observation is equally pertinent to the usurpation by Congress of the reserved powers of the States through the exercise of the taxing power.

The decision in the Child Labor Case was by the close vote of five to four.[20] It served, however, to put an end to the effort to secure a national child labor law under the commerce clause. The advocates of such a law then turned to the taxing power. It may be remarked in passing that it was a matter of no conse-

---

[18] Kidd *v.* Pearson, 128 U. S. 24, 9 Sup. Ct. 6; United States *v.* E. C. Knight Co., 156 U. S. 1, 15 Sup. Ct. 249.

[19] Hammer *v.* Dagenhart, 247 U. S. 251, 38 Sup. Ct. 529.

[20] Mr. Justice Holmes wrote a dissenting opinion, in which Justices McKenna, Brandeis, and Clarke concurred.

quence to them that most of the States had adopted child labor laws and were making rapid progress toward satisfactory legislation on this subject. As a result of the agitation, Congress passed the act of February 24, 1919,[21] imposing, in addition, to all other taxes imposed by law, an annual "excise tax equivalent to ten per centum of the entire net profits" arising each year from the sale or disposition of the products of any mine, quarry, mill, cannery, workshop, factory, or manufacturing establishment which at any time during the year shall have employed or permitted to work children under certain prescribed ages and for periods longer than or other than those specified in the act.

Two suits were soon brought in the United States District Court for the Western District of North Carolina to obtain relief against the enforcement of this law. The first was a suit to enjoin the collection of a child labor tax assessed under the statute on the ground that the law was unconstitutional. In an able opinion Judge Boyd of the District Court held the law unconstitutional and granted a permanent injunction.[22] On appeal this decree was reversed by the Supreme Court and the cause remanded with directions to dismiss the bill, on the ground that the suit was brought contrary to section 3224 of the Revised Statutes, providing that "No suit for restraining the assessment or collection of any tax shall be maintained in any court". The

[21] 40 Stat. L. 1057, 1138-1140.

[22] George *v.* Bailey, 274 Fed. 639. In the course of his opinion Judge Boyd quotes and comments upon the North Carolina child labor law. He says: "By comparing federal and State statutes it will be readily seen that the latter affords as much protection to the health and physical condition of children as the former, and, as stated before, the State act co-ordinates its purpose to promote physical welfare with provisions for mental training, and, further, an important provision in the State statute is the punishment provided for its violation, instead of undertaking, as the federal act, to make the income of an establishment using child labor illegally the subject of taxation, it denounces as a criminal offense the violation of its provisions, and subjects the offender to a fine or imprisonment, or both at the discretion of the court. * * * For this reason the State statute is undoubtedly more capable of prompt execution than the act of Congress, and the expenses incident to it, when compared to that of the federal plan, must necessarily be a great deal less; but, however that may be, the burden incident to the enforcement of the State law is not a drain upon the federal treasury, but is borne by the State."

brief opinion by Chief Justice Taft did not touch upon the constitutionality of the statute.[23]

The other suit was an action to recover back a child labor tax paid under protest. The plaintiff, a corporation, had employed and permitted to work in its factory a boy under fourteen years of age, thus becoming subject to the payment of a tax of ten per cent. on its entire net profits for the year, the tax amounting to $6,312.79. The District Court, in this case also held the statute to be unconstitutional and gave judgment for the plaintiff.[24] This judgment was affirmed by the Supreme Court, Mr. Justice Clarke alone dissenting.[25] The opinion of the court was written by Chief Justice Taft. The essential nature of the law as a police regulation rather than a revenue measure is clearly exposed, and the earlier decisions are stated and distinguished. In the course of his opinion the Chief Justice said:

> "The law is attacked on the ground that it is a regulation of the employment of child labor in the States—an exclusively State function under the federal Constitution and within the reservations of the Tenth Amendment. It is defended on the ground that it is a mere excise tax levied by the Congress of the United States under its broad power of taxation conferred by section 8, article 1, of the federal Constitution. We must construe the law and interpret the intent and meaning of Congress from the language of the act. The words are to be given their ordinary meaning unless the context shows that they are differently used. Does this law impose a tax with only that incidental restraint and regulation which a tax must inevitably involve? Or does it regulate by the use of the so-called tax as a penalty? If a tax, it is clearly an excise. If it were an excise on a commodity or other thing of value, we might not be permitted under previous decisions of this court to infer solely from its heavy burden that the act intends a prohibition instead of a tax. But this act is more. It provides a heavy exaction for a departure from a detailed and specified course of conduct in business." [Here follows an analysis of the act.] "In the light of these features of the act, a court must be blind not to see that the so-called tax is imposed to stop

[23] Bailey *v.* George (Oct. Term, 1921), 42 Sup. Ct. 419.
[24] Drexel Furniture Co. *v.* Bailey, 276 Fed. 452.
[25] Bailey *v.* Drexel Furniture Co. (Oct. Term, 1921), 42 Sup. Ct. 449.

the employment of children within the age limits prescribed. Its prohibitory and regulatory effect and purpose are palpable. All others can see and understand this. How can we properly shut our minds to it?

"It is the high duty and function of this court in cases regularly brought to its bar to decline to recognize or enforce seeming laws of Congress, dealing with subjects not intrusted to Congress, but left or committed by the supreme law of the land to the control of the States. We cannot avoid the duty, even though it require us to refuse to give effect to legislation designed to promote the highest good. The good sought in unconstitutional legislation is an insidious feature, because it leads citizens and legislators of good purpose to promote it, without thought of the serious breach it will make in the ark of our covenant, or the harm which will come from breaking down recognized standards. In the maintenance of local self-government, on the one hand, and the national power, on the other, our country has been able to endure and prosper for near a century and a half.

"Out of a proper respect for the acts of a co-ordinate branch of the government, this court has gone far to sustain taxing acts as such, even though there has been ground for suspecting, from the weight of the tax, it was intended to destroy its subject. But in the act before us the presumption of validity cannot prevail, because the proof of the contrary is found on the very face of its provisions. Grant the validity of this law, and all that Congress would need to do, hereafter, in seeking to take over to its control any one of the great number of subjects of public interest, jurisdiction of which the States have never parted with, and which are reserved to them by the Tenth Amendment, would be to enact a detailed measure of complete regulation of the subject and enforce it by a so-called tax upon departures from it. To give such magic to the word "tax" would be to break down all constitutional limitation of the powers of Congress and completely wipe out the sovereignty of the States.

"The difference between a tax and a penalty is sometimes difficult to define, and yet the consequences of the distinction in the required method of their collection often are important. Where the sovereign enacting the law has power to impose both tax and penalty, the difference between revenue production and mere regulation may be immaterial but not so when one sovereign can impose a tax only, and the power of regulation rests in another. Taxes are occasion-

> ally imposed in the discretion of the Legislature on proper subjects with the primary motive of obtaining revenue from them and with the incidental motive of discouraging them by making their continuance onerous. They do not lose their character as taxes because of the incidental motive. But there comes a time in the extension of the penalizing features of the so-called tax when it loses its character as such and becomes a mere penalty, with the characteristics of regulation and punishment. Such is the case in the law before us."

On the same day on which the Child Labor Tax Law was held unconstitutional (May 15, 1922) the Supreme Court also held invalid the Grain Future Trading Act of August 24, 1921,[26] and for substantially the same reasons. This act imposed a tax of 20 cents a bushel on all contracts for the sale of grain for future delivery but excepted from its application sales on boards of trade designated as contract markets by the Secretary of Agriculture, on fulfillment by such boards of certain conditions and requirements set forth in the act. The real nature of the statute as a regulation of boards of trade was shown by its title, namely, "An act taxing contracts for the sale of grain for future delivery, and options for such contracts, and providing for the regulation of boards of trade, and for other purposes".

In a suit brought by members of the Chicago Board of Trade to prevent the enforcement of the act on the ground that it was unconstitutional, the Supreme Court so held, the opinion in this case also being written by Chief Justice Taft.[27] Said he:

> "It is impossible to escape the conviction, from a full reading of that law, that it was enacted for the purpose of regulating the conduct of business of boards of trade through supervision of the Secretary of Agriculture and the use of an administrative tribunal consisting of that Secretary, the Secretary of Commerce, and the Attorney General. Indeed the title of the act recites that one of its purposes is the regulation of boards of trade. * * * The act is in essence and on its face a complete regulation of boards of trade, with a penalty of 20 cents a bushel on all 'futures' to coerce boards of trade and their members into compliance.

[26] 42 Stat. L. 187.

[27] Hill *v.* Wallace (Oct. Term, 1921), 42 Sup. Ct. 453.

> When this purpose is declared in the title to the bill, and is so clear from the effect of the provisions of the bill itself, it leaves no ground upon which the provisions we have been considering can be sustained as a valid exercise of the taxing power. * * * Our decision, just announced, in *Bailey* v. *Drexel Furniture Co.*, involving the constitutional validity of the Child Labor Tax Law, completely covers this case."

The statute was also held not valid as a regulation of interstate commerce. The court was unanimous in holding this act unconstitutional.

The Harrison Drug Act, the Child Labor Acts, and the Future Trading Act, illustrate the extent to which Congress has already gone in stretching its powers so as to encroach upon the reserved powers of the States. In the words of Madison, it "is everywhere extending the sphere of its activity, and drawing all power into its impetuous vortex". How apt also at this time is the declaration of Hamilton that constitutional limitations "can be preserved in practice in no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights and privileges would amount to nothing."

From the standpoint of constitutional law the decision in the Child Labor Tax Law case is one of the most important decisions of the Supreme Court since the time of Marshall. It is probably the most important since the *Slaughter-House Cases*,[28] decided in 1873, though it was foreshadowed by the decision in the first child labor case. Although arising under radically different conditions, the child labor cases and the *Slaughter-House Cases* involved the same great question, namely, whether Congress, through the exercise of a general police power, could take over in large measure the reserved powers of the States, thus breaking down the carefully adjusted apportionment of power between the State and federal governments, which constitutes one of the foundation stones of our constitutional system. The importance of preserving this apportionment is not at all ap-

[28] 16 Wall. (U. S.) 36.

preciated by the general public, and the mass of the people seems to favor federal regulation of almost everything. Congress has been ready, if not eager, to satisfy this popular demand. The Constitution has few defenders in that body. Of late the Supreme Court itself has seemed at times almost to have lost its grasp of things. Now comes the decision in the second child labor case to clear the atmosphere with its ringing reassertion of fundamental principles.

The opinion of Chief Justice Taft in this case leaves nothing to be desired. No more satisfactory opinion on a constitutional question has been rendered by the Supreme Court since the Civil War. This opinion alone, in the writer's judgment, justifies the appointment of Mr. Taft as Chief Justice, should his work end here. It may not have been due to his influence, but it is interesting to note that three of the four justices who dissented in the first child labor case, and four of the five justices who held the Harrison Drug Act constitutional, concurred in the decision in the second child labor decision, and all concurred in holding the Future Trading Act unconstitutional. Yet the principles involved in all these cases were essentially the same.

The decisions in the child labor cases are unpopular with the general public. Though the court has generally been spoken of by the lay press with respect, its decisions in these cases have been widely deplored. A prominent religious paper expressed a common sentiment when it said:

> "The friends of children the country over have learned with profound regret that the child labor law enacted by Congress in 1919 has been declared unconstitutional by the Supreme Court of the United States. * * * The question is entirely too technical to be pronounced upon by the average layman, but it certainly seems too bad that the safeguards against the exploitation of childhood so carefully built up during the last few years are now ruthlessly to be thrown down and our children are in many states to be allowed to be drawn into the gaping maw of the Moloch of a merciless and relentless commercialism."

Thus, as Chief Justice Taft so strikingly says:

> "The good sought in unconstitutional legislation is an insidious feature, because it leads citizens and legislators of good

> purpose to promote it, without thought of the serious breach it will make in the ark of our covenant, or the harm which will come from breaking down recognized standards."

It may be added that a movement has already been started to secure an amendment to the Constitution to authorize child labor legislation by Congress.[29] This, of course, is the proper way to secure additional power for Congress, when desirable, but the proposed amendment is not only objectionable because not needed, but also because it would place still another burden on our already overloaded government at Washington. Meanwhile the recent decisions of the Supreme Court assure us that the tendency toward an invasion by Congress of the reserved powers of the States has for the present, at least, been definitely checked.

Joseph R. Long.

WASHINGTON AND LEE UNIVERSITY,
LEXINGTON, VA.

---

[29] In an editorial comment in WORLD'S WORK for September, 1922, on the recent child labor decision and the proposed constitutional amendment, it is said: "It is quite plain that public sentiment does not endorse this decision, that it has produced a most unfavorable impression, and that it has given the radicals another opportunity to bring forth all their standing grievances against the Supreme Court." Then, after commenting on the backwardness of several States in adopting adequate child labor laws, the editorial continues: "It is to be hoped that certain States will be sufficiently awakened by this proposal to adopt enlightening [*sic*] legislation on this issue; such a change of heart would make the amendment unnecessary. The interference of the Federal Government in so local a concern as manufacturing, even when the purpose aimed at is one that makes so strong an appeal to the best human instinct, is something that is not lightly to be regarded. This represents a tendency which has already been carried too far." The editor confuses the recent child labor decision with the earlier one and supposes that the later act was passed under the commerce clause. He says: "Chief Justice Taft has now decided that this prohibition is an undue extension of the commerce clause."